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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

12 BARBARA LEWIS, AKEMI BUCKINGHAM,
13 BOBBIE JOE HULING, CYNTHIA
14 WHETSELL, MARTHA MERLE, ELAINA
HUFNAGEL, TERESA GATTUSO, ELISSA
15 WAGNER, and DIXIE WILLIAMS,
individually and on behalf of all others similarly
situated,

No. 4:18-cv-02248-PJH
(Consol. with No.
4:18-cv-02505-PJH)

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

CLASS ACTION

Date: February 20, 2019
Time: 9:00 a.m.
Judge: Phyllis J. Hamilton

16 Plaintiffs,
17 v.
18 RODAN + FIELDS, LLC, a California limited
liability company,

20 Defendant.

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I. ISSUES PRESENTED

- (1) Do Plaintiffs' allegations, when taken as true, contain a short and plain statement showing that they have suffered injuries in fact that are fairly traceable to Defendant? *See infra* 6-7.
 - (2) Plaintiffs claim that Defendant deceptively omitted information about its product's serious side effects. Do Plaintiffs allege the circumstances of those omissions with particularity? *See infra* 9-13.
 - (3) Have Plaintiffs Lewis and Buckingham plausibly alleged that Defendant violated the California Unfair Competition Law (UCL), False Advertising Law (FAL), Consumer Legal Remedies Act, and California common law? *See infra* 13-20.
 - (4) Has Plaintiff Huling plausibly alleged that Defendant violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and Florida common law? *See infra* 20-21.
 - (5) Has Plaintiff Whetsell plausibly alleged that Defendant violated the Illinois Consumer Fraud Act (ICFA) and Illinois common law? *See infra* 22-23.
 - (6) Has Plaintiff Merle plausibly alleged that Defendant violated Massachusetts General Laws chapter 93A and Massachusetts common law? *See infra* 23-24.
 - (7) Have Plaintiffs Hufnagel, Gattuso, and Wagner plausibly alleged that Defendant violated New York General Business Law (GBL) sections 349 and 350 and New York common law? *See infra* 24-25.
 - (8) Has Plaintiff Williams plausibly alleged that Defendant violated the Washington Consumer Protection Act (CPA) and Washington common law. *See infra* 26.
 - (9) Have Plaintiffs plausibly alleged the elements of a civil claim against the Defendant under the Racketeer Influenced and Corrupt Organizations (RICO) Act? *See infra* 27-34.

II. INTRODUCTION

Defendant Rodan + Fields (“R+F”) sells Lash Boost as an eyelash-enhancing serum, but it does not disclose that Lash Boost’s active ingredient is a prostaglandin analog, a type of chemical that is known to produce serious side effects, including cysts, blurred vision, sunken eyes, droopy eyelids, eye pain, darkening of the skin, and change in eye color. The nine Plaintiffs, kept in the dark about Lash Boost’s side effects, bought the product. Each suffered a known side effect of Lash Boost’s active ingredient—some of them serious enough to require medical attention. They now bring this action to recover the money they spent on Lash Boost due to R+F’s deception.

R+F defends itself against Plaintiffs' claims mostly by ignoring what the Consolidated Complaint ("Complaint" or "CC") actually alleges. Plaintiffs suggest a review of their detailed Complaint, which alleges precisely what R+F claims it does not:

Proven side effects. Scientists have found that the ingredient in Lash Boost, just like other prostaglandin analogs, has serious side effects. R+F denies this science. Later in this case, R+F will be entitled to try to marshal evidence to support its denialism, but it cannot rest on its denials now, when Plaintiffs, relying on the scientific literature, have advanced specific factual allegations about Lash Boost’s side effects. Nor can R+F defend its concealment of Lash Boost’s side effects by pointing to its packaging and labeling, which is deathly silent about Lash Boost’s most serious side effects, and whose nebulous reference to “irritation” tells, at best, a misleading half-truth.

Injury. The Complaint alleges compensable, cognizable economic injuries. It explains in some detail why Plaintiffs would not have spent money to buy Lash Boost if they had known of its side effects. The Complaint also alleges what common sense suggests: that a cosmetic that routinely harms its users' bodies is worth less than one that does not.

Causation. Plaintiffs lost money on Lash Boost because R+F utterly failed to disclose the product's side effects. According to R+F, however, the Complaint never alleges whether Plaintiffs

1 read, and thus relied on, R+F’s statements about Lash Boost. But precisely because R+F never
2 disclosed the side effects, Plaintiffs would have remained unaware of those side effects *whether or not*
3 they had read everything R+F said about Lash Boost. (What is more, the Complaint alleges that
4 Plaintiffs *were* exposed to Lash Boost’s packaging and labeling. CC ¶ 109.) The Complaint suggests
5 several ways in which R+F could have disclosed those side effects—and alleges that if it had done so,
6 Plaintiffs would have learned of the side effects and never spent money on Lash Boost. *See infra* 9-11.

7 ***State of mind.*** A wide array of allegations plausibly show that R+F knew of Lash Boost’s
8 serious side effects, but decided not to disclose them. It is improbable that R+F, a company that boasts
9 of its ownership by two doctors, did not know of the ample body of scientific literature on
10 prostaglandin analogs’ side effects, including an FDA warning letter about precisely the same
11 ingredient that is in Lash Boost. And if that were not enough, R+F explicitly acknowledged on its
12 website that other lash-enhancing products were known to cause side effects—while denying, contrary
13 to the science, that the ingredient in its own product lacks those side effects. R+F ignores these
14 allegations, but that does not make them go away. Its motion to dismiss should be denied.

III. SUMMARY OF FACTS¹

Lash Boost and its side effects. Lash Boost, marketed as an eyelash-enhancing serum, contains a chemical called isopropyl cloprostenate. CC ¶ 2. Isopropyl cloprostenate is in a family of chemicals called prostaglandin analogs, which are used to treat glaucoma. CC ¶¶ 83, 86. The scientific literature has found that prostaglandin analogs have serious side effects, including cysts, blurred vision, sunken eyes due to changes in the surrounding cells, darkening of the skin, eye pain, droopy eyelids, change in eye color, burning, stinging, and excessive tearing. *Id.* ¶¶ 88–91.

R+F claims that there is no evidence that the ingredient in Lash Boost—isopropyl cloprostenoate—causes these side effects. The scientific literature disagrees. Studies find that these

²⁴ ¹ Further details are discussed in the body of this Opposition where relevant.

1 side effects are common to *all* prostaglandin analogs. *E.g.*, *id.* ¶¶ 89 n.41, 91. This is confirmed by a
2 2011 warning letter from the FDA that specifically concerned isopropyl cloprostenate, the same
3 ingredient in Lash Boost. *Id.* ¶ 83. There, the FDA noted that harmful side effects are associated with
4 prostaglandin analogs as a class, *id.*—side effects that are well-known among eye doctors, *id.* ¶ 3.

5 **R+F’s omissions about Lash Boost.** Despite the science on prostaglandin analogs, R+F has
6 chosen not to disclose the side effects associated with Lash Boost’s active ingredient. Nowhere in any
7 of its communications—neither on its packaging, labeling, its website, or in its communications with
8 the consultants who sell Lash Boost—has R+F disclosed that Lash Boost’s ingredient can cause
9 serious side effects. Instead, on Lash Boost’s packaging and labeling, it has told consumers merely to
10 “[d]iscontinue use” if there is irritation, and that if the irritation “persists” or “is significant,” to consult
11 a physician. *Id.* ¶¶ 100, 106-07. This says nothing about the many other serious side effects of Lash
12 Boost, and indeed does not even disclose that serious irritation is a known side effect. *See infra* 15-16.

13 These omissions are part of R+F’s larger strategy to portray Lash Boost as a cosmetic rather
14 than a drug. Because consumers expect that cosmetics, unlike drugs, will not have serious side effects,
15 R+F’s strategy is intended to increase sales of Lash Boost. *See id.* ¶¶ 242, 386.

16 **R+F’s business.** R+F portrays itself as a “source of trusted information” owned by “doctors,
17 not businesswomen.” *Id.* ¶¶ 119, 133. R+F sells Lash Boost online and through a multi-level
18 marketing program. *Id.* ¶¶ 72, 74. This multi-level marketing program uses independent contractors—
19 called “consultants”—to sell R+F products through social media. *Id.* ¶ 74. These consultants also
20 have relationships with each other. Indeed, R+F hosts conventions and Facebook groups for them—
21 forums where they network with, learn from, and support each other. *Id.* ¶¶ 389, 399. R+F does not
22 tell its consultants about Lash Boost’s side effects. *Id.* ¶ 118.

23 **Plaintiffs and other consumers.** Plaintiffs are nine of the many consumers who purchased
24 Lash Boost. Even though they were all exposed to Lash Boost’s packaging, *see id.* ¶ 109, R+F’s

1 omission of Lash Boost’s serious side effects from all of its consumer communications rendered
2 Plaintiffs unaware of them. *Id.* ¶¶ 21, 28, 35, 42, 49, 55, 60, 64, 68. After using the product, all of
3 them suffered side effects, some of which were quite serious.² Two Plaintiffs were even forced to go
4 to physicians for treatment. *See id.* ¶¶ 26, 58. None of them would have chosen to purchase Lash
5 Boost if they had known about its potential side effects. *Id.* ¶¶ 23, 30, 37, 44, 51, 57, 61, 65, 69.

6 Plaintiffs are not alone. Many consumers have made vehement complaints about Lash Boost’s
7 serious side effects. *Id.* ¶ 140. Yet R+F has taken pains on its website to affirmatively *deny* that Lash
8 Boost has potential adverse effects. *Id.* ¶ 133. Because the public is unaware of its side effects, Lash
9 Boost commands a higher price than it would if R+F made full disclosure. *See, e.g., id.* ¶¶ 117, 386.

IV. JURISDICTION

A. Legal standard

12 A party may mount either a “factual” or a “facial” challenge to subject-matter jurisdiction.
13 *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014). A factual challenge relies on
14 “evidence properly before the court to contest the truth of the complaint’s allegations.” *Id.* at 780
15 (citation and quotation omitted). A facial challenge does not contest allegations. Instead, it asserts
16 that, even if they are true, they do not invoke the court’s jurisdiction. *Id.* at 780.

17 R+F brings a facial challenge. It submits no evidence to challenge the Court’s jurisdiction.
18 While it (erroneously) asks the Court to take judicial notice of certain materials,³ a facial challenge
19 permits a court to consider judicially noticeable facts along with a complaint. *See, e.g., CopyTele, Inc.*
20 *v. E Ink Holdings, Inc.*, 962 F. Supp. 2d 1130, 1135–36 (N.D. Cal. 2013). In a facial challenge, a court
21 determines whether a complaint’s factual allegations, if taken as true, *Planet*, 750 F.3d at 780, contain

22 ² *Id.* ¶¶ 24-26 (infection of eyelid oil gland), 31 (burning, stinging, red and flaky skin on eyelid), 38-39
23 (red and itchy eyes and change of eye color), 45 (impaired vision), 52 (dry and itchy eyes), 58 (darker
24 skin around eyes, puffy eyes), 62 (eye pain, blurry vision), 66 (white discharge from eyes), 70
(discolored eyelid, permanent bump on eyelid).

³ *See* Plaintiffs’ Opposition to Defendant’s Request for Judicial Notice (filed herewith).

1 a ““short and plain statement’ of the grounds for jurisdiction.” *Doe v. Holy See*, 557 F.3d 1066, 1074
2 (9th Cir. 2009) (quoting Fed. R. Civ. P. 8(a)(1)).

3 **B. Plaintiffs have standing**

4 R+F argues incorrectly that Plaintiffs do not satisfy two of the three requirements for standing:
5 (1) an injury in fact (2) that is fairly traceable to R+F. *See Motion to Dismiss (“MTD”)* 7-8.

6 **1. Plaintiffs have suffered an injury in fact**

7 Plaintiffs that “spen[d] money that, absent defendants’ actions, they would not have spent,”
8 allege a “quintessential injury-in-fact.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011);
9 *accord, e.g., Gregorio v. Clorox Co.*, No. 17-cv-3824-PJH, 2018 WL 732673, at *5 (N.D. Cal. Feb. 6,
10 2018). Here, Plaintiffs allege just that—in detail. They allege that prostaglandin analogs, including
11 the active ingredient of Lash Boost, have serious side effects that scientists have extensively
12 documented. These side effects include droopy eyelids, cysts, darkening of eyelid skin, impaired
13 vision, and changes in eye color. *See, e.g.*, CC ¶¶ 88-91 (citing to medical literature). They allege that
14 none of them were aware of any of these possible side effects before purchasing Lash Boost. *Id.* ¶¶ 21,
15 28, 35, 42, 49, 55, 60, 64, 68. They allege that consumers wishing to lengthen and improve the
16 appearance of their eyelashes may determine that the risk of “potentially vision impairing, painful, and
17 permanent consequences” outweighs any cosmetic benefit they may receive from Lash Boost. *Id.* ¶
18 92; *see also id.* ¶¶ 129-30. And they allege that they themselves would not have purchased or used
19 Lash Boost had they known of its possible side effects. *Id.* ¶¶ 23, 30, 37, 44, 51, 57, 61, 65, 69.

20 R+F does not confront these allegations, let alone explain why they are insufficient under Rule
21 8(a)(1). Instead, it argues that Plaintiffs lack standing because it failed to warn them “about side
22 effects that they never experienced.” MTD 7. This argument misses the mark. Plaintiffs *did*
23 experience side effects about which R+F failed to warn. CC ¶¶ 24-26, 31, 38-39, 45, 52, 58, 62, 66,
24 70. More importantly, the relevant injury in fact is not the side effects themselves but the money they

1 spent on a product that failed to warn them of the side effects. R+F next maintains that Lash Boost did
2 not cause Plaintiffs any pregnancy-related harm, MTD 7, but that does not negate the economic
3 injuries they *did* suffer, which stemmed from a failure to disclose side effects that could afflict not just
4 pregnant women, but anyone. Finally, R+F analogizes this case to *Birdsong v. Apple, Inc.*, 590 F.3d
5 955 (9th Cir. 2009) (cited by MTD 8), but in that case the plaintiffs lacked standing under the UCL for
6 two reasons. First, the iPods' diminution in value due to the risk of hearing loss was not actual or
7 imminent, stemming as it did from a customer's own possible decision to listen to an iPod too loud.
8 *Id.* at 961. Second, the plaintiffs had not lost the benefit of their bargain, since they *admitted* that
9 Apple had warned "against listening to music at loud volumes." *Id.* Here, by contrast, it is an
10 ingredient in Lash Boost, not consumers, that causes side effects, *see CC ¶¶ 83, 88-91, 123*, and R+F
11 failed to warn about Lash Boost's side effects, *id. ¶¶ 106-07, 130, 133*.

2. Plaintiffs' injury in fact is fairly traceable to R+F.

R+F maintains that Plaintiffs have failed to allege a fairly traceable injury because they do not
allege that they read R+F's statements about Lash Boost. MTD 8. But Plaintiffs' case is not based on
affirmative misrepresentations. Because Plaintiffs allege that R+F's *omission* of side effects injured
them, they need only allege that if R+F had properly disclosed the side effects, they would not have
purchased Lash Boost (or would have bought it at a lower price). *See Bias v. Wells Fargo & Co.*, 942
F. Supp. 2d 915, 931 (N.D. Cal. 2013). As Plaintiffs discuss below, they have alleged in detail that
R+F failed to disclose the side effects, and that if it had, Plaintiffs would not have purchased Lash
Boost. *See infra* 9-11, 15-17.

V. VALIDITY OF CLAIMS

A. Legal standard

In evaluating whether a complaint states a claim, courts assume that the allegations of the complaint are true so long as they “contain sufficient allegations of underlying facts to give fair notice

1 and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th
2 Cir. 2011). Those allegations must then “plausibly suggest an entitlement to relief.” *Id.* This standard
3 “is not akin to a ‘probability requirement,’ and the complaint need not contain ‘detailed factual
4 allegations.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Rather, a plaintiff’s
5 entitlement to relief need only be a “reasonable inference” to draw from the factual allegations. *Id.*

6 As opposed to allegations about other matters, which need only comply with Rule 8(a), a
7 plaintiff alleging fraud “must state with particularity the circumstances constituting fraud.” Fed. R.
8 Civ. P. 9(b). Under this rule, fraud must be alleged in terms “specific enough to give defendants notice
9 of the particular misconduct . . . so that they can defend against the charge and not just deny that they
10 have done anything wrong.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
11 (quotation and citation omitted). In cases involving fraudulent omissions, like this one, Rule 9(b)
12 applies, but the plaintiff “will not be able to specify the time, place, and specific content of an omission
13 as precisely as would a plaintiff in a false representation claim.” *Falk v. Gen. Motors Corp.*, 496 F.
14 Supp. 2d 1088, 1099 (N.D. Cal. 2007). “Because the plaintiffs are alleging a failure to act instead of
15 an affirmative act,” they “cannot point out the specific moment when the Defendant failed to act.”
16 *MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014) (quotation, alteration, and
17 citation omitted). Moreover, if the plaintiffs are alleging—as here—that certain information was
18 omitted from *all* labeling, advertising, and other communications by the defendant, and not just one
19 particular communication, they need not allege that they relied on certain communications in making
20 their purchase. *See, e.g., In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1113 (N.D. Cal. 2015)
21 (distinguishing *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992 (N.D. Cal. 2009)); *MacDonald*, 37 F.
22 Supp. 3d at 1096 (same). At most, their complaint must “set forth an explanation as to why [a]
23 statement or omission complained of was false and misleading,” *Bias*, 942 F. Supp. 2d at 932 (quoting
24 *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)), and allege facts suggesting that if

1 the defendant had properly disclosed the omitted fact, the plaintiffs would have been aware of it and
2 behaved differently, *see, e.g., In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-2617-LHK, 2016 WL
3 3029783, at *35 (N.D. Cal. 2016); *Carrier IQ*, 78 F. Supp. 3d at 1114.

4 **B. Plaintiffs have satisfied Rule 9(b).**

5 **1. Plaintiffs have alleged the circumstances of R+F's omissions with particularity.**

6 Plaintiffs have alleged the circumstances of R+F's omissions with particularity. First, they
7 have explained in detail why R+F's omissions were "false and misleading." *Bias*, 942 F. Supp. 2d at
8 932 (quoting *GlenFed*, 42 F.3d at 1548). Lash Boost's prostaglandin analog has serious side effects
9 that the Complaint alleges with specificity. CC ¶¶ 88-91. R+F's omissions were false and misleading
10 because they failed to disclose those "serious adverse side effects." CC ¶ 101; *see also id.* ¶¶ 105-07,
11 113 (same). R+F never disclosed these side effects *anywhere*: "The materials provided to consultants
12 who sell Lash Boost, the Rodan + Fields website, and the product labeling all suffer from the same
13 material omissions." *Id.* ¶ 102. Plaintiffs have included quotations or samples of these documents in
14 the Complaint, explaining what they failed to disclose. *Id.* ¶¶ 100, 106-07, 125, 128, 130.

15 Plaintiffs have specifically alleged where and how R+F *could* have disclosed the truth to
16 consumers. It "could have advised consultants, updated [its] website, included new packaging
17 materials, or modified their product label to advise Plaintiffs of the adverse [side] effects." *Id.* ¶ 120.
18 Plaintiffs have even pointed to the product insert sold with Latisse as an example of such warnings.
19 *See id.* ¶¶ 96-98. Lash Boost contains none of those warnings. *Id.* ¶ 99.

20 Finally, Plaintiffs have alleged facts from which to infer that if R+F had properly advised its
21 consultants, updated its website, included new packaging materials, and modified its product label to
22 include side-effect warnings, Plaintiffs would have become aware of those side effects and would have
23 decided not to purchase Lash Boost. *Anthem Data Breach Litig.*, 2016 WL 3029783, at *35; *Carrier*
24 *IQ*, 78 F. Supp. 3d at 1114. Recall that Plaintiffs could have purchased through two channels: through

1 consultants or online. CC ¶¶ 72, 74. If R+F had directed consultants to disclose Lash Boost's side
2 effects to customers, *id.* ¶ 120, Plaintiffs who purchased Lash Boost from consultants, *id.* ¶¶ 40, 67,
3 would *necessarily* have become aware of the side effects. If the Plaintiffs purchased Lash Boost online
4 and R+F had included side-effect warnings, *see id.* ¶ 120, it is likewise inevitable that Plaintiffs would
5 have learned of those side effects. Even if Plaintiffs still could have somehow remained ignorant, the
6 Complaint alleges that all class members were exposed to Lash Boost's packaging. *Id.* ¶ 109.
7 Naturally, then, purchasers would have noticed an "extensive package insert" of the kind that
8 accompanies Latisse. *Id.* ¶ 95. Indeed, such an insert, containing proper warnings, would have been
9 difficult to ignore. *See id.* ¶ 98 (noting that the Latisse insert measured 14 by 22 inches).

10 Similarly, it is reasonable to infer that Plaintiffs, once made aware of Lash Boost's side effects,
11 would have decided not to purchase the product. That is precisely what they allege. *See id.* ¶¶ 23, 30,
12 37, 44, 51, 57, 61, 65, 69; *see also Anthem Data Breach Litig.*, 2016 WL 3029783, at *35 (noting that
13 plaintiffs had alleged that they would not have enrolled in Anthem services if Anthem had made proper
14 disclosure); *Carrier IQ*, 78 F. Supp. 3d at 1114 (noting that plaintiffs had alleged that they would not
15 have purchased the relevant product if the defendants had made proper disclosure). The vehement
16 consumer complaints about Lash Boost online show the same thing:

- 17 • "Used this product for one month. Well a month in and my left eye will NOT stop
tearing. Terrible!"
- 18 • "Not worth the pain or risk."
- 19 • Lash Boost "made my skin dark and gave me a sunken in eye look.... I have aged ten
years in 7 weeks. But I have lashes. NOT WORTH IT! RF needs to put warnings on
[the product]."

20 CC ¶ 140. The "intensity" of this "outcry" demonstrates "the materiality" of what R+F omitted and
21 underscores that Plaintiffs would have acted differently if R+F had told them the truth. *Carrier IQ*, 78

1 F. Supp. 3d at 1114; *see also Anthem Data Breach Litig.*, 2016 WL 3029783, at *35 (pointing to
2 “public response” to data breach to support a similar proposition).

3 R+F maintains that Plaintiffs have failed to identify where it should have disclosed Lash
4 Boost’s side effects and to allege that Plaintiffs would have seen that disclosure. MTD 11. But as
5 Plaintiffs have just shown, they have done both. R+F simply ignores Plaintiffs’ allegations.

6 R+F also maintains that Plaintiffs needed to identify a “representation by R+F” that they relied
7 on. *Id.* Because Plaintiffs allege actionable omissions, they need not allege that they have relied on
8 representations. They merely need to allege, as they do, that if R+F had made proper disclosures, they
9 would have noticed those disclosures and behaved differently. *See Davidson v. Apple, Inc.*, No. 16-
10 CV-4942-LHK, 2017 WL 3149305, at *14 (N.D. Cal. July 25, 2017).

11 **2. While Plaintiffs are not required to allege the circumstances of their purchases with
particularity, they have done so.**

12 R+F argues that Plaintiffs are required to allege the circumstances of their purchases with
13 particularity, but R+F confuses the circumstances of its own fraud, which *are* required to be pleaded
14 with particularity, with the circumstances of Plaintiffs’ *injury*, which are not. *Bird v. First Alert, Inc.*,
15 No. C 14-3585 PJH, 2015 WL 3750225, at *9 (N.D. Cal. June 15, 2015), is not to the contrary,
16 because the discussion R+F cites concerns the defendant’s disclosures, not the plaintiff’s purchase.
17

18 In any event, Plaintiffs *have* pleaded their purchases with particularity. They allege the price of
19 Lash Boost. CC ¶ 16. They each allege the specific month they made their purchases. *Id.* ¶¶ 20, 27,
20 33, 40, 47, 53, 59, 63, 67. An exact date is not required to give R+F fair notice. *See Shroyer v. New*
21 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010) (“relatively definite time frame”
22 was sufficient); *Izsak v. Wells Fargo Bank, N.A.*, No. C 13-05362 SI, 2014 WL 1478711, at *3 (N.D.
23 Cal. Apr. 14, 2014) (“exact date” not required; “around June 2011” was sufficient). Plaintiffs also
24 allege facts plausibly suggesting that they made their purchases in their places of residence. *See* CC

1 ¶¶ 17, 79. Two Plaintiffs allege that they made the purchases through a consultant, *id.* ¶¶ 40, 67, while
2 the others purchased Lash Boost either through a consultant or online, *id.* ¶ 72. Further specificity is
3 not required. Each Plaintiff gives a narrow date range for their purchases, so specifically alleging
4 consultants' names or the channel through which a Plaintiff made a purchase is not necessary to
5 "reduce the burdens of a necessary records search," *Izsak*, 2014 WL 1478711, at *3, or to allow R+F to
6 "prepare an adequate answer," *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (citation and
7 quotation omitted) (complaint satisfied Rule 9(b) even though it did not "describe in detail a single
8 specific transaction").

9 **3. Plaintiffs plausibly allege a scientific basis for Lash Boost's serious side effects.**

10 The Complaint contains detailed allegations about Lash Boost's side effects. The active
11 ingredient in Lash Boost is isopropyl cloprostenate, a synthetic prostaglandin analog. CC ¶¶ 2, 83.
12 The FDA has noted that isopropyl cloprostenate, like other prostaglandin analogs, has serious side
13 effects. *Id.* ¶ 83. Plaintiffs also allege—with citations—that a large scientific literature has developed
14 on the serious side effects of prostaglandin analogs. *Id.* ¶¶ 88-91. And to further show isopropyl
15 cloprostenate's side effects, the Complaint alleges: (1) that each of the Plaintiffs developed a side
16 effect consistent with the scientific literature on prostaglandin analogs, *see id.* ¶¶ 24-25, 31, 38-39, 45,
17 52, 58, 62, 66, 70; and (2) that online complaints about Lash Boost document those side effects, *see id.*
18 ¶ 140.

19 Yet R+F contends that Plaintiffs have failed to "allege[] scientific facts to show that Lash Boost
20 actually causes" side effects. MTD 12. It says that allegations about other prostaglandin analogs or
21 about the FDA warning letter do not show that Lash Boost itself causes side effects. But the FDA's
22 warning letter was *specifically* about isopropyl cloprostenate. *Id.* ¶ 83. And Plaintiffs allege—with
23 support from the literature—that *all* prostaglandin analogs cause the same constellation of side effects.
24 *See* CC ¶¶ 5 (all have the same "side effect profile[]"), 87 & n.5 (citing to article about prostaglandin

1 analogs), 89 n.41 (discussing “[c]ommon known side effects of *these drugs*” (emphasis added)), 91
2 (side effect “*associated with all the drugs in the class*”). Because isopropyl cloprostenoate is a
3 prostaglandin analog, *id.* ¶ 83, it necessarily shares these side effects.

4 R+F also insists that the Complaint merely alleges that “R+F lacked evidence of safety.”
5 MTD 12. The Complaint alleges not a lack of evidence, but a profusion of affirmative evidence that
6 the ingredient in Lash Boost causes serious side effects. *Id.* ¶¶ 88-91.

7 Finally, R+F cites *Aloudi v. Intramedic Research Group*, 729 F. App’x 514 (9th Cir. 2017),
8 which, it claims, shows that the Complaint is deficient. In *Aloudi*, the plaintiffs claimed that the
9 defendant had falsely asserted that its product JavaSLIM could produce weight loss. They supported
10 this claim by relying on a study that did not test “the same active ingredients” contained in JavaSLIM
11 “in a dose similar to that in JavaSLIM.” *Id.* at 516. Here, however, Plaintiffs not only cite an FDA
12 warning letter about precisely the same ingredient that is in Lash Boost, CC ¶ 83, but allege that all
13 prostaglandin analogs, including the prostaglandin analog in Lash Boost, have been shown in the
14 literature to cause the same side effects when used topically, *see id.* ¶¶ 5, 87 & n.5, 89 & n.41, 91.⁴

15 **C. Plaintiffs Lewis and Buckingham state claims under California law.**

16 **1. Legal standards**

17 Plaintiffs Lewis and Buckingham assert claims under the CLRA, UCL, and FAL, as well as
18 claims under California law for negligent misrepresentation and fraudulent concealment.

19 ⁴ Plaintiffs have cited an FDA warning letter about exactly the same ingredient that Lash Boost
20 contains, but nothing in *Aloudi* suggests that the citation is necessary. Plaintiffs may rely on studies
about the *category* of prostaglandin analogs so long as they allege plausibly, as they have, that Lash
21 Boost contains a prostaglandin analog and that all prostaglandin analogs have the same side effects.
Hence, studies of prostaglandin analogs are highly relevant. The other cases R+F cites are not
22 apposite. *See Corral v. Carter’s Inc.*, No. 1:13-cv-0262 AWI SKO, 2014 WL 197782, at *4 (E.D.
Cal. Jan. 16, 2014) (where there was more than one “type of crib bumper[],” a single study about crib
bumpers as a whole, without more, did not show that the defendant’s crib bumper was dangerous);
23 *Eckler v. Wal-Mart Stores, Inc.*, No. 12-CV-727-LAB-MDD, 2012 WL 5382218, at *7 (S.D. Cal.
Nov. 1, 2012) (studies did not show falsity when they merely showed that a different formulation
24 could not treat a different condition than the one that the defendant said its formulation could “help”).

1 Under the CLRA, the concealment or suppression of a fact about a product is actionable if the
2 defendant had a duty to disclose the fact, the omission is likely to mislead a reasonable consumer, *see*
3 *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255-56 (2011), and the consumer has suffered “any
4 damage,” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013) (quoting Cal. Civ. Code §
5 1780(a)). R+F does not deny that it had a duty to disclose the side effects of Lash Boost.⁵

6 Both the FAL and UCL require a “loss of money or property” that constitutes an “injury in
7 fact.” *Kwikset v. Superior Court*, 51 Cal. 4th 310, 322 (2011). Under the FAL, a plaintiff must also
8 establish that the defendant engaged in advertising by which a “reasonable consumer” is “likely to be
9 deceived.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The UCL prohibits
10 “fraudulent” business practices, among others. Cal. Bus. & Prof’l Code § 17200. A “fraudulent”
11 practice is one likely to deceive members of the public. *See In re Tobacco II Cases*, 46 Cal. 4th 298,
12 312 (2009).

13 R+F correctly states the elements of claims for fraudulent concealment and negligent
14 misrepresentation under California law. *See* MTD 14. R+F does not dispute that Lash Boost’s serious
15 side effects were a “material fact,” that it was “under a duty to disclose” that fact, that Plaintiffs were
16 “unaware” or “ignoran[t]” of those side effects, or that it lacked “reasonable grounds for believing”
17 Lash Boost not to have serious side effects. *Id.* at 14:9-11, :19-20 (quotation and citation omitted).

18 **2. Plaintiffs have plausibly alleged an injury in fact and a loss of money.**

19 R+F says that Plaintiffs have failed to allege that they suffered an injury in fact and lost money
20 as a result of R+F’s misconduct (elements of the UCL or FAL), that they suffered “any damage” (an
21

22

⁵ While R+F does not contest the point, it had a duty to disclose Lash Boost’s side effects because it
23 had exclusive knowledge of them, *see, e.g., Elias v. Hewlett-Packard Co.*, No. 12-CV-00421-LHK,
24 2014 WL 493034, at *9 (N.D. Cal. Feb. 5, 2014); *Johnson v. Harley-Davidson Motor Co. Grp. LLC*,
285 F.R.D. 573, 583 (E.D. Cal. 2012); *see also* CC ¶¶ 112, 113, and because it made misleading
partial representations, *see, e.g., Torres v. JC Penney Corp., Inc.*, No. 12-cv-01105-JST, 2013 WL
1915681, at *5 (N.D. Cal. May 8, 2013); *see also* CC ¶¶ 106-07, 109; *infra* at 15-16, 32.

1 element of the CLRA, Cal. Civ. Code § 1780(a)), and that they suffered damages due to R+F's
2 negligent misrepresentation or fraudulent concealment. MTD 13, 14, 19. R+F is wrong.

3 As Plaintiffs have noted, they have alleged an injury in fact because they paid for a product
4 they would not have purchased absent R+F's deception. *See supra* 6-7. Plaintiffs have also
5 established a loss of money under the UCL and FAL; they have alleged that they "would not have
6 bought the product but for" R+F's omission of Lash Boost's side effects. *Kwikset*, 51 Cal. 4th at 330;
7 *see also, e.g., In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1072 (N.D. Cal. 2012) (plaintiffs
8 had standing because they alleged that if the defendant had made full disclosure, they would have paid
9 less or would not have purchased the product). And, finally, because Plaintiffs have established a loss
10 of money under the UCL and FAL, they have necessarily established that they suffered "any damage"
11 under the CLRA. *See Hinojos*, 718 F.3d at 1108.

12 Plaintiffs have likewise established damages under their California common-law claims, under
13 which they are, "at a minimum, . . . entitled to out-of-pocket and related damages." *Petrus v. N.Y. Life*
14 *Ins. Co.*, No. 14-cv-2268-BAS-JMA, 2016 WL 1255812, at *6 (S.D. Cal. Mar. 31, 2016); *see also*
15 *Lazar v. Superior Court*, 12 Cal. 4th 631, 646 (1996) ("[F]raud plaintiffs may recover 'out-of-pocket'
16 damages in addition to benefit-of-the-bargain damages."). Here, Plaintiffs plausibly allege that they
17 would not have paid money for Lash Boost if R+F had not concealed the side effects from them, so
18 they have suffered out-of-pocket damages in the amount that they paid for Lash Boost.

19 **3. Plaintiffs have plausibly alleged an actionable failure to disclose Lash Boost's serious
side effects.**

20 R+F claims that it disclosed *one* of Lash Boost's side effects: its capacity to cause irritation.⁶
21 MTD 15. But R+F merely told consumers to "[d]iscontinue use" if there was irritation, *id.* ¶¶ 100,
22

23
24 ⁶ Plaintiffs assume that this and similar arguments are directed to (1) whether the omission is likely to
deceive a reasonable consumer under the UCL, FAL, and CLRA, *Consumer Advocates v. Echostar*

1 107, and that if the irritation “persists” or “is significant,” to consult a physician, *id.* ¶¶ 106-07. With
2 respect to irritation, these statements are deceptive half-truths, because while they raise the possibility
3 that irritation *may occur*, they do not disclose that the irritation is an inherent side effect of Lash
4 Boost’s active ingredient rather than due to a customer’s sensitive skin, other individual trait, or mere
5 happenstance.⁷ *Cf. Doe v. SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1079 (N.D. Cal. 2014)
6 (disclosure that online profiles “may” be shared did not disclose that they would always be shared, and
7 shared widely). And even if these statements *did* qualify as a disclosure that irritation is a side effect,
8 they do not disclose Lash Boost’s many other serious side effects, including changed eye color,
9 darkened skin, droopy eyelids, and cysts. *Compare CC* ¶¶ 88-91, *with id.* ¶¶ 100, 102, 106-07, 118,
10 120.

11 R+F also suggests that Plaintiffs have not alleged facts to show “what a reasonable consumer
12 believes,” and thus cannot show that R+F’s omission would be likely to mislead reasonable consumers.
13 MTD 14. In fact, Plaintiffs have alleged ample facts showing what a reasonable consumer believes.
14 Plaintiffs allege that R+F purposely marketed Lash Boost as a cosmetic rather than a drug precisely to
15 “defraud customers” and gain “higher profits.” CC ¶ 386; *see also, e.g., id.* ¶¶ 12, 81-82, 85, 98-99,
16 103, 133, 242. From this allegation, one may reasonably infer that reasonable consumers expect that
17

18 *Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003); and (2) whether R+F omitted a fact, an element
19 of Plaintiffs’ common-law claims, *see* MTD 14. R+F does not challenge materiality.

20 ⁷ This is well illustrated by the websites that R+F cites in arguing that “most consumers would likely
21 know that cosmetics used around the eye can cause irritation.” MTD 16. One of those websites
22 complains of the writer’s “insanely sensitive, dry eyes that get red and irritated really easily,”
23 Stephanie Saltzman, *The Best Mascaras for Sensitive Eyes*, Allure Blog (Oct. 27, 2014),
24 <https://www.allure.com/story/mascara-for-sensitive-eyes>, while the other post is directed to readers
who “have sensitive eyes,” Erin Lukas, *10 Hypoallergenic Mascaras for When Your Eyes Are Just As
Sensitive As You*, InStyle Blog, <https://www.instyle.com/beauty/eyes/best-mascaras-sensitive-eyes>
(last visited Dec. 17, 2018). These websites indicate that consumers know that irritation can result if
they have sensitive eyes—not that they expect cosmetics used around the eyes to contain ingredients
known to cause serious irritation.

1 drugs may cause side effects, but expect that if a cosmetic—particularly one that they apply to their
2 eyes—caused serious side effects, the cosmetic maker would disclose those side effects prominently.
3 See also *id.* ¶¶ 364, 375 (consumer reasonably expects that cosmetic applied to eyelids will fully
4 disclose side effects). Plaintiffs also allege that many consumers complained vehemently about the
5 side effects they experienced when using Lash Boost, *id.* ¶¶ 140-41—which suggests that reasonable
6 consumers did not expect serious side effects. Consumers complained precisely because Lash Boost
7 confounded their expectations. Finally, Plaintiffs allege that R+F portrays itself as a “source of trusted
8 information,” a reliable company owned by “doctors, not businesswomen.” *Id.* ¶¶ 119, 133. A
9 reasonable consumer would thus expect that R+F would not sell a cosmetic that causes serious side
10 effects, or would sell such a cosmetic only after full disclosure of its risks.

11 R+F next argues that “because Plaintiffs do not claim to have read R+F’s existing disclosures,
12 they cannot show that additional disclosures would have mattered.” MTD 15. In fact, the Complaint
13 alleges not only that Plaintiffs were exposed to existing disclosures, CC ¶ 109, but also that additional
14 disclosures would have prompted Plaintiffs to behave differently, *see supra* 9-11. R+F also repeats
15 that Plaintiffs do not identify what R+F should have disclosed. That is not true. *See supra* 9, 12-13.

16 **4. Plaintiffs have plausibly alleged that R+F knew that Lash Boost had serious side effects,
but failed to disclose them.**

17 According to R+F, the UCL, FAL, and CLRA require Plaintiffs to allege that when R+F sold
18 Plaintiffs Lash Boost, it knew that it had serious side effects or acted with reckless disregard for
19 whether it did.⁸ A heightened pleading standard does *not* apply to Plaintiffs’ allegations that R+F
20 knew of Lash Boost’s serious side effects. “Malice, intent, knowledge, and other conditions of a
21

22 ⁸ The CLRA contains such a requirement, but the FAL and the “fraudulent” prong of the UCL do not.
23 See *Tobacco II*, 46 Cal. 4th at 312. The UCL contains that requirement only if the plaintiff is
24 proceeding under the UCL’s “unlawful” prong and asserts that the other law that the defendant’s
business practice has violated is a law, like the CLRA, that requires knowledge of falsity. *See Wilson
v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145-46 (9th Cir. 2012).

1 person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also Odom v. Microsoft Corp.*, 486
2 F.3d 541, 554 (9th Cir. 2007) (en banc).

3 Plaintiffs have easily satisfied this pleading standard. They have alleged that there is an
4 extensive literature testifying to the serious side effects of prostaglandin analogs, *see CC ¶¶ 88-91*,
5 making it highly probable that a company manufacturing a product containing a prostaglandin analog,
6 particularly a company owned by two doctors, would know about its side effects. Making this
7 knowledge even more probable is the warning letter that the FDA issued in 2011 about the side effects
8 of isopropyl cloprostene, Lash Boost's active ingredient. *Id. ¶ 83*. Indeed, there is even direct
9 evidence of R+F's knowledge: R+F has *explicitly acknowledged* that other lash products have side
10 effects—while denying, contrary to the science, that Lash Boost somehow lacks those side effects. *Id.*
11 ¶ 130. R+F's knowledge of Lash Boost's side effects is further suggested by the sheer number of
12 customer complaints about those side effects, *id. ¶ 140*, and the pains that R+F has taken to *deny* that
13 Lash Boost has the "potential adverse effects" of which its customers have complained. *Id. ¶ 133; see*
14 *also id. ¶ 130*. Together, all these allegations make it improbable that R+F would *not* have known that
15 Lash Boost causes serious side effects—indeed, the very same side effects as other drugs containing
16 prostaglandin analogs. Allegations that are similar to, if less detailed than, Plaintiffs' have been
17 consistently deemed sufficient to allege knowledge. *See Luong v. Subaru of Am., Inc.*, No. 17-cv-
18 03160-YGR, 2018 WL 2047646, at *6 (N.D. Cal. May 2, 2018) (knowledge of falsity supported by
19 allegations of "prior testing, analysis, and consumer complaints"); *Myers v. BMW of N. Am., LLC*, No.
20 16-cv-00412-WHO, 2016 WL 5897740, at *4 (N.D. Cal. Oct. 11, 2016) (customer complaints may
21 support knowledge when they are submitted to a forum the defendant is likely to view); *Overton v.*
22 *Bird Brain, Inc.*, No. SACV 11-1054 DOC, 2012 WL 909295, at *6 (C.D. Cal. Mar. 15, 2012)
23 (knowledge adequately alleged by citing past lawsuits about product in question).

24 R+F's only contrary argument is that it "warn[ed] consumers of irritation" and that Plaintiffs do
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(Consol. with No.
4:18-cv-02505-PJH)

1 “not allege scientific facts” to show that Lash Boost causes serious side effects. MTD 17. But R+F
2 did *not* properly warn consumers that one of Lash Boost’s side effects was irritation, and Plaintiffs do
3 allege detailed “scientific facts” to assert that Lash Boost causes serious side effects. *See supra* 12, 15.

4 **5. Plaintiffs have plausibly alleged justifiable reliance.**

5 Plaintiffs have plausibly alleged that, if R+F had properly disclosed Lash Boost’s side effects,
6 they would not have purchased the product. *See supra* 10-11.

7 **6. Plaintiffs have plausibly alleged R+F’s intent to deceive and to induce reliance.**

8 R+F asserts that Plaintiffs have failed to allege that R+F intended to deceive and to induce
9 reliance, an element of fraudulent concealment. MTD 19. R+F again ignores Plaintiffs’ extensive
10 factual allegations showing that R+F knew of Lash Boost’s side effects but failed to disclose them.
11 *See supra* 17-19. R+F also ignores Plaintiffs’ allegations showing that R+F concealed those side
12 effects as part of a larger strategy of marketing Lash Boost as a cosmetic—a strategy intended to
13 increase sales precisely by deceiving customers and inducing their reliance on R+F’s omissions. *See*
14 CC ¶¶ 103 (making of Latisse claimed that another company marketing isopropyl cloprostenate as a
15 cosmetic caused Latisse to lose sales, i.e., *boosted* sales of the product containing isopropyl
16 cloprostenate), 133 (noting that R+F stressed that Lash Boost was “not a drug product”), 242 (alleging
17 that R+F’s omissions were intended to induce consumers “to believe that Lash Boost did not have the
18 same side effects as other drug products on the market”), 386 (“Marketing Lash Boost as a cosmetic
19 enables Rodan + Fields to evade disclosure requirements of the FDA and defraud consumers. This
20 scheme of failing to disclose adverse side effects translated into higher profits....”).

21 **7. At the pleading stage, Plaintiffs need not allege that they lack an adequate remedy at law.**

22 According to R+F, Plaintiffs’ equitable claims under the UCL and FAL must be dismissed.
23 Because Plaintiffs are seeking damages for the same conduct, they necessarily have an adequate
24 remedy at law. MTD 18. The UCL, however, requires no showing that legal remedies are inadequate.

1 As the UCL states, “Unless otherwise specifically provided, the remedies or penalties provided by this
2 chapter are cumulative to each other, *and to the remedies or penalties available under all other laws of*
3 *this state.*” Cal. Bus. & Prof'l Code § 17205 (emphasis added); *see Cabrales v. Castle & Cooke*
4 *Mortg., LLC*, No. 1:14-cv-01138-MCE-JLT, 2015 WL 3731552, at *4 (E.D. Cal. June 12, 2015).

5 R+F also ignores that Plaintiffs may “state as many separate claims or defenses as [they]
6 ha[ve], regardless of consistency.” Fed. R. Civ. P. 8(d)(3). Thus, Plaintiffs’ UCL and FAL claims
7 cannot be dismissed simply because Plaintiffs also seek damages. *See, e.g., Nat'l Corp. Tax Credit*
8 *Funds II, IV, VII v. Potashnik*, No. CV 07-3528 PSG (FMOx), 2008 WL 11337276, at *7 (C.D. Cal.
9 Jan. 8, 2008) (citing *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 563 (9th Cir. 1977)) (refusing to
10 dismiss negligence claim simply because it sought contract damages). District courts increasingly
11 decline, at the pleading stage, to dismiss claims seeking equitable relief simply because the plaintiff
12 also seeks damages. *See, e.g., Aberin v. Am. Honda Motor Co.*, No. 16-cv-04384-JST, 2018 WL
13 1473085, at *9 (N.D. Cal. Mar. 26, 2018); *Adkins v. Comcast Corp.*, No. 16-cv-05969-VC, 2017 WL
14 3491973, at *3 (N.D. Cal. Aug. 1, 2017); *Cabrales*, 2015 WL 3731552, at *4; *see also Adkins*, 2017
15 WL 3491973, at *3 (noting that “[a] few federal courts” have ruled otherwise). Indeed, dismissal at
16 this stage is premature, for if a claim for damages should fail later in the case, an adequate remedy at
17 law would indeed be lacking. *See Cabrales*, 2015 WL 3731552, at *4 (noting that plaintiff may pursue
18 an equitable claim should “legal remedies be unavailing”).

19 **D. The other Plaintiffs have stated claims under the consumer protection laws of other
20 states.**

21 **1. Plaintiff Huling has stated a claim under the FDUTPA.**

22 The FDUTPA outlaws “deceptive acts or practices” in “trade or commerce,” Fla. Stat. §
23 501.204(1), which include an “omission . . . that is likely to mislead the consumer acting reasonably in
24 the circumstances, to the consumer’s detriment.” *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of*

1 *Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. Dist. Ct. App. 2015) (quotation and citation omitted).

2 Here, for the reasons given above, Plaintiffs have alleged just such an omission. *See supra* 15-17.

3 Consumers may plead causation and damages under the FDUTPA by alleging that because the
4 defendant deceived them, they either bought a product they would not have otherwise bought, or
5 received a product that was worth less than they paid for it. *See Hill v. Hoover Co.*, 899 F. Supp. 2d
6 1259, 1264-65 (N.D. Fla. 2012); *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990 (Fla. Dist. Ct.
7 App. 2004). As noted above, Plaintiffs have alleged that but for R+F’s omissions, they would not have
8 purchased Lash Boost. *See supra* 10-11. Nor is it “speculative” or “subjective,” MTD 20 (citation and
9 quotation omitted), to allege that a cosmetic that causes serious side effects is worth less than one that
10 does not.

11 R+F claims that Plaintiff Huling cannot show causation because she has not alleged that she
12 read “information or materials regarding” Lash Boost. *Id.* But Huling’s FDUTPA claim is based on
13 omissions, not misrepresentations. R+F omitted information about Lash Boost’s side effects from *all*
14 its communications—so *whether or not* Huling read Lash Boost materials, she would still have
15 purchased it. Causation is shown because Huling alleges that if R+F had not concealed Lash Boost’s
16 side effects, she would not have bought it. *See Beaver v. Inkmart, LLC*, No. 12-60028, 2012 WL
17 3822264, at *4 (“With regard to causation, Plaintiffs allege that Beaver would not have decided to
18 purchase the Inkmart franchise had Beaver known of Paras’ failed business venture in TechHero.”).

19 R+F also argues that Huling fails to allege that the purchase took place in Florida. MTD 20-21.
20 But that fact may easily be inferred from the Complaint, which alleges that Huling lives in Florida, CC
21 ¶ 32, and that all sales take place through consultants or online, *id.* ¶ 72. It would be remarkably
22 *unreasonable* to infer that Huling travelled outside her state to buy Lash Boost when she could have
23 easily purchased it online.

1 **2. Plaintiff Whetsell has stated a claim under the ICFA.**

2 IFCA prohibits unfair or deceptive business practices, which include “the concealment,
3 suppression or omission of any material fact, with intent that others rely upon the concealment,
4 suppression or omission.” 815 ILCS 505/2.

5 While proving actual damages under IFCA requires plaintiffs to allege more than simply that
6 they would not have purchased the product but for defendant’s deceptive practice, plaintiffs may
7 support actual damages by alleging that they paid more for a product than it was worth due to the
8 deception. *See Terrazzino v. Wal-Mart Stores, Inc.*, --- F. Supp. 3d ----, 2018 WL 3921301, at *5
9 (N.D. Ill. Aug. 16, 2018); *McDonnell v. Nature’s Way Prods., LLC*, No. 16 C 5011, 2017 WL
10 4864910, at *2 (N.D. Ill. Oct. 26, 2017); *Block v. Lifeway Foods, Inc.*, No. 17 C 1717, 2017 WL
11 3895565, at *5 (N.D. Ill. Sept. 6, 2017). Here, the Complaint alleges facts showing that Lash Boost
12 was worth less than Plaintiff Whetsell paid—or, to put it differently, that Lash Boost commanded a
13 higher price because consumers did not know of its side effects. The Complaint alleges that Whetsell,
14 like the public generally, was not aware of Lash Boost’s side effects. *See* CC ¶¶ 42-44, 140-41. This
15 ignorance translates to a higher price for the product. *See id.* ¶ 386. As a result, Whetsell paid a higher
16 price for Lash Boost than she would have if R+F had disclosed Lash Boost’s serious side effects. *See*
17 *id.* ¶ 117 (“Plaintiffs lost money as a result of Rodan + Fields’ omissions, in that they did not receive
18 what they paid for...”).

19 To argue that Whetsell has not alleged actual damages, R+F relies on inapposite cases. It cites
20 cases in which a plaintiff claimed that he or she was deceived by a seller’s claim that an item’s retail
21 price was higher than the price at which the seller listed the item. In those cases, however, the
22 plaintiffs received the benefit of the bargain because they could not “establish that the value of what
23 [they] received was less than the value of what [they were] promised.” *Mulligan v. QVC, Inc.*, 888
24 N.E.2d 1190, 1197 (Ill. 2008); *accord Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739-40

1 (7th Cir. 2014); *Kim v. Carter's Inc.*, 598 F.3d 362, 365-66 (7th Cir. 2010). It also cites a case that did
2 not address actual damages. *See Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 334 (7th
3 Cir. 2018) (plaintiff's "claims fail for a different reason altogether").

4 R+F argues that Whetsell must plead, but has failed to plead, "reliance." MTD 21-22; *but see*
5 *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 12 (Ill. App. Ct. 2001). Plaintiffs *have* alleged
6 reliance in detail, *see supra* 9-11, which satisfies ICFA. *Miller*, 762 N.E.2d at 12.

7 **3. Plaintiff Merle has stated a claim under Massachusetts General Laws Chapter 93A.**

8 Massachusetts General Laws chapter 93A, section 2, prohibits deceptive acts or practices in the
9 conduct of any trade or commerce. Mass. Gen. Laws Ch. 93A, § 2(a). A practice is deceptive "if it
10 could reasonably be found to have caused a person to act differently from the way he otherwise would
11 have acted." *Lowell Gas Co. v. Att'y Gen.*, 385 N.E.2d 240, 249 (Mass. 1979). Here R+F's omissions
12 could reasonably be found to have caused consumers to act differently. *See supra* 16-17.⁹

13 R+F says that Merle has not pleaded reliance. Although chapter 93A does not require reliance,
14 *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 486 (Mass. 2004), Merle alleges it. *See supra* 9-11.

15 R+F next argues that Merle has not alleged "an actionable injury" because she has failed to
16 allege facts showing a difference in value between what she paid and what she received. MTD 22, 23.
17 R+F is incorrect. Under chapter 93A, a plaintiff may establish economic injury by alleging that during
18 the plaintiff's "usage or ownership" of a product, the product "did not deliver the full anticipated and
19 advertised benefits, and therefore were worth less, as used or owned, than what the plaintiffs had paid."

20 ⁹ R+F also claims that Merle has failed to properly allege that it "failed to disclose anything it had a
21 duty to disclose." MTD 22. Under chapter 93A, however, "a duty exists . . . to disclose material
22 facts known to a party at the time of a transaction." *Underwood v. Risman*, 605 N.E.2d 832, 835
23 (Mass. 1993). Plaintiffs have amply alleged that R+F knew of Lash Boost's side effects when it sold
24 the product to Merle. *See supra* 17-19. Under chapter 93A, "[t]o determine if the nondisclosure of a
material fact," courts "ask whether the plaintiff likely would have acted differently but for the
nondisclosure." *Casavant v. Norwegian Cruise Line, Ltd.*, 919 N.E.2d 165, 170 (Mass. App. Ct.
2009). Plaintiffs have alleged detailed facts to show that Merle would indeed have acted differently
if Lash Boost's side effects had been disclosed. *See supra* 9-11.

1 *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 54 N.E.3d 1106, 1112 (Mass. 2016); *see also Ferreira*
2 *v. Sterling Jewelers, Inc.*, 130 F. Supp. 3d 471, 479 (D. Mass. 2015) (economic injury established by
3 ownership of a product “whose value was artificially inflated by a deceptive act or practice at the time
4 of purchase” (quotation and citation omitted)). Here, for the reasons given above, the Complaint
5 plausibly alleges that due to R+F’s omissions, Merle paid a higher price for Lash Boost than she would
6 have if R+F had disclosed Lash Boost’s serious side effects. *See supra* 22; *see also* CC ¶ 117.

7 *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1 (1st Cir. 2017), on which R+F relies, is inapplicable.
8 *Shaulis* is a case about comparative price deception. Shaulis claimed that she had been injured because
9 Nordstrom had falsely claimed that the sweater she bought was sold elsewhere at a higher price. *See*
10 *id.* at 5. The First Circuit rejected this theory because Shaulis had “fail[ed] to identify any bargained-
11 for characteristic of the sweater that she ha[d] not received.” *Id.* at 12. Here, by contrast, Merle
12 alleges that she did not receive a bargained-for characteristic of Lash Boost: a product that would not
13 cause serious side effects. Because Lash Boost was “deficient” in an “objectively identifiable way,”
14 Lash Boost was worth less than Merle paid for it. *Id.*; *see also O’Hara v. Diageo-Guinness, USA, Inc.*,
15 306 F. Supp. 3d 441, 459-60 (D. Mass. 2018) (noting that there is a reasonable inference of
16 overpayment if the product is held out as safer or healthier than it really is); *supra* 22.

17 **4. Plaintiffs Hufnagel, Gattuso, and Wagner state a claim under the New York GBL.**

18 “[T]o prevail in a cause of action under GBL §§ 349 and 350, the plaintiff must prove that the
19 defendant made misrepresentations or omissions that were likely to mislead a reasonable consumer in
20 the plaintiff’s circumstances, that the plaintiff was deceived by those misrepresentations or omissions
21 and that as a result the plaintiff suffered injury.” *Solomon v. Bell Atl. Corp.*, 777 N.Y.S.2d 50, 55
22 (App. Div. 2004). Here, contrary to R+F’s assertion, MTD 24, Plaintiffs have plausibly alleged that
23 R+F’s omissions were likely to mislead reasonable consumers in their circumstances. *See supra* 16-
24 17.

1 R+F again insists that Plaintiffs have merely alleged that they would not have bought Lash
2 Boost but for R+F's omissions. MTD 24. But they have alleged that ““the price of [Lash Boost] was
3 inflated as a result of [the] defendant’s deception,”” a theory they “may properly allege . . . in
4 conjunction” with their allegations that they would not have purchased Lash Boost but for the
5 omissions. *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 481 (S.D.N.Y.
6 2014) (quoting *Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445, 448 (App. Div. 2007)).¹⁰ See *supra* 22.

7 R+F next asserts that Plaintiffs have failed to allege causation, apparently because, according to
8 R+F, Plaintiffs have not asserted that they read R+F's representations about Lash Boost. MTD 25.
9 While an affirmative-misrepresentation claim under GBL sections 349 or 350 requires specific
10 allegations about a defendant's statements and whether a plaintiff was exposed to them, a claim
11 premised on an omission need not make such allegations. *Catalano v. BMW of N. Am., LLC*, 167 F.
12 Supp. 3d 540, 562 (S.D.N.Y. 2016); *In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 860 (S.D.
13 Ohio 2012); *Woods v. Maytag Co.*, 807 F. Supp. 2d 112, 129 (E.D.N.Y. 2011). R+F did not disclose
14 Lash Boost's serious side effects *anywhere*, so Plaintiffs would have purchased Lash Boost at an
15 inflated price *whether or not* they read R+F's statements.

16 Finally, R+F maintains that Plaintiffs have not properly alleged that they “made their purchases
17 within New York.” MTD 25. But the Complaint alleges that Plaintiffs all reside in New York, CC
18 ¶¶ 53, 59, 63, and since Lash Boost is sold online or through individual consultants, *id.* ¶ 72, it is
19 highly plausible to infer that Plaintiffs made their purchases in New York. See *supra* 21.

20
21
22 ¹⁰ R+F cites *DaCorta v. AM Retail Grp.*, No. 16-CV-01748 (NSR), 2018 WL 557909, at *9 (S.D.N.Y.
23 Jan 23, 2018) for the proposition that GBL sections 349 and 350 do not recognize this as an injury.
24 MTD 25 n.7. *DaCorta* did not reject the legal theory, but merely held that the plaintiff's allegations
were conclusory. Here, the allegations are detailed. See *supra* 22. The other case that R+F cites
does not appear to be available on Westlaw.

1 **5. Plaintiff Williams has stated a claim under the Washington CPA.**

2 R+F says Plaintiff Williams has not alleged a “misleading or untrue statement,” MTD 26, but
3 the Complaint satisfies Washington’s broad capacity-to-deceive standard. *See Hangman Ridge*
4 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986) (deceptiveness turns on
5 whether a practice “had the *capacity* to deceive a substantial portion of the public,” and noting that the
6 “purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs”); *supra* 15.

7 R+F also contends that Williams has failed to allege causation or injury. But since Williams
8 has established that R+F omitted a material fact, her allegations have created—at the least—a question
9 of fact as to causation. *See Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 391 P.3d 582, 587-88
10 (Wash. Ct. App. 2017) (a material omission raises a rebuttable presumption of reliance and hence
11 causation). Williams has also established injury under the Washington CPA, which recognizes a
12 “broad” scope of cognizable injuries. *Stephens v. Omni Ins. Co.*, 159 P.3d 10, 25 (Wash. Ct. App.
13 2007). She has suffered an injury because she received a product that was worth less than she paid for
14 it. *See Matheny v. Unumprovident Corp.*, 594 F. Supp. 2d 1212, 1226 (E.D. Wash. 2009) (the “amount
15 of actual damages” awarded under CPA was “Plaintiff’s benefit of the bargain”).

16 **E. Plaintiffs state claims under the common law of Florida, Massachusetts, New York,
17 Washington, and Illinois.**

18 R+F’s arguments against Plaintiffs’ common-law claims simply restate arguments discussed
19 above. R+F asserts that Plaintiffs have failed to allege “deceptive conduct.” MTD 27. That is false.
20 *See supra* 15-17. It says that Plaintiffs have failed to allege “justifiable reliance,” MTD 27, which is
21 likewise false, *see supra* 9-11. It contends that Plaintiffs have failed to allege “resulting harm.” MTD
22 27. Again, that is incorrect. *See supra* 14-15, 22. Finally, R+F maintains that Plaintiffs “do not allege
23 particularized facts to support their claim that R+F intended to defraud consumers.” MTD 27. In fact,
24 Plaintiffs satisfy the correct pleading standard on that element. *See supra* 19.

1 **F. Plaintiffs state a RICO claim.**

2 ***1. Plaintiffs have plausibly alleged that they have statutory standing.***

3 Plaintiffs have plausibly alleged a cognizable harm to business or property that has resulted in
4 concrete financial loss. CC ¶¶ 23, 30, 37, 44, 51, 57, 61, 65, 69, 431. Overpayment due to deception
5 confers statutory standing under RICO. “In the ordinary context of a commercial transaction, a
6 consumer who has been overcharged can claim an injury to her property, based on a wrongful
7 deprivation of her money.” *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008) (citing
8 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979)). Thus, in cases like this one, “[w]hen a plaintiff
9 alleges that he or she overpaid for a good or service because of anticompetitive or deceptive conduct
10 . . . such an injury is one to ‘property,’ not merely ‘expectation interests.’” *In re Chrysler-Dodge-Jeep*
11 *EcoDiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 961 (N.D. Cal. 2018);
12 accord *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, --- F. Supp. 3d
13 ----, 2018 WL 4777134, at *14 (N.D. Cal. Oct. 3, 2018). “Money has physical form; and the
14 overpayment of money. . . is a tangible injury” and there is a “relatively low threshold for plaintiffs to
15 adequately plead a ‘concrete’ RICO injury.” *EcoDiesel Mktg.*, 295 F. Supp. 3d at 261-62.

16 R+F relies on certain out-of-circuit decisions where courts have rejected “expectation-interest”
17 theories under RICO. MTD 29:20-24, 30:19-31:1. As Judge Chen has noted, however, overpayment
18 “for a good or service because of . . . deceptive conduct” is an injury “to ‘property,’ not merely
19 ‘expectation interests.’” See *EcoDiesel Mktg.*, 295 F. Supp. 3d at 960. This case, in which Plaintiffs
20 overpaid due to R+F’s deception, is thus distinguishable from *McLaughlin v. American Tobacco*, 522
21 F.3d 215 (2d Cir. 2008), the principal case on which R+F relies, for there the plaintiffs were not
22 actually alleging that they had paid “an artificially inflated price” for a product. *EcoDiesel Mktg.*, 295
23 F. Supp. 3d at 960. R+F also relies on the inapposite *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000),
24 where the plaintiffs had not actually alleged that they had each received inferior health care due to the

1 defendant's actions. *Id.* at 487. Finally, while Plaintiffs need not allege a specific dollar amount by
2 which they overpaid, they have alleged that they overpaid by approximately \$150—the retail purchase
3 price of the product. CC ¶ 16; see, e.g., *EcoDiesel Mktg.*, 295 F. Supp. 3d at 962-63; *see also Cohen v.*
4 *Trump*, 303 F.R.D. 376, 388-89 (S.D. Cal. 2014) (allowing plaintiffs to prove that their RICO damages
5 equaled the purchase price of the education for which they paid due to the defendant's deception).

6 ***2. Plaintiffs have plausibly alleged that R+F proximately caused their injuries.***

7 The central question in the RICO causation inquiry is “whether the alleged violation led
8 directly to the plaintiff’s injuries.” *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Here,
9 there are no more direct victims of the wrongful conduct than Plaintiffs. All Plaintiffs allege in detail
10 that they would not have purchased or used Lash Boost had R+F not omitted from its website, and
11 from its other mail and wire communications, that Lash Boost has serious side effects.

12 R+F argues, however, that Plaintiffs must plead reliance and have failed to do so. MTD 31-32.
13 Both the Supreme Court and the Ninth Circuit, however, have held that reliance is not an element of a
14 RICO claim. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649 (2008); *Living Designs, Inc. v.*
15 *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 363 (9th Cir. 2005).

16 R+F has also failed to point to a RICO case in which a court required plaintiffs to show reliance
17 when they alleged that the defendant had made fraudulent *omissions* rather than only affirmative
18 misrepresentations. Because Plaintiffs allege that R+F universally failed to disclose the physical
19 dangers of Lash Boost, and because they allege that they were deceived by that omission into
20 purchasing Lash Boost—something they would not have done but for the omission—they have
21 sufficiently alleged proximate causation. While R+F argues that the Complaint “is silent on what
22 omissions” caused Plaintiffs’ injuries, and does not “specifically describe any omissions,” MTD 32,
23 these statements once again ignore the many allegations in the Complaint that allege these matters in
24

1 detail.¹¹ The Complaint also alleges how the “consultants . . . caused Plaintiffs’ injuries,” *id.*: because
2 R+F kept the consultants in the dark, consumers who bought from the consultants did not learn of Lash
3 Boost’s side effects. *See CC ¶ 391* (“Consultants similarly fail to disclose adverse side effects. . . when
4 they interact directly with customers to sell Rodan + Fields products.”); *see also id.* ¶¶ 102, 118, 120,
5 387, 391. R+F cannot make these allegations disappear simply by ignoring them.

6 ***3. Plaintiffs plausibly allege the existence of a RICO enterprise.***

7 A RICO “enterprise” consists of “any individual, partnership, corporation, association, or other
8 legal entity, or any union or group of individuals associated in fact, although not as a legal entity.”
9 18 U.S.C. § 1961(4). The Ninth Circuit has referred to this definition as “expansive” and “not very
10 demanding.” *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quotation and citation
11 omitted). R+F asserts that for an association-in-fact to count as an enterprise, the “common purpose
12 must be criminal in nature.” MTD at 33. But the Supreme Court has already laid out the required
13 structural features for an “association-in-fact” enterprise: “[1] a purpose, [2] relationships among those
14 associated with the enterprise, and [3] longevity sufficient to permit those associates to pursue the
15 enterprise’s purpose.” *Boyle v. United States*, 556 U.S. 938, 946 (2009). Notably, these elements
16 simply require a *purpose*, not a solely criminal purpose. And the Supreme Court has already rejected
17 the view that civil RICO claims should be limited to cases where the defendant has been convicted of a
18 criminal offense that constitutes a RICO predicate act. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S.
19
20

21 ¹¹ *See, e.g.*, CC ¶¶ 101 (“[T]he information accompanying the product . . . failed to include the serious
22 adverse side effects associated with the prostaglandin analog in Lash Boost.”), 102 (R+F’s
23 “Frequently Asked Questions” fact sheet did not “disclose all of the side effects associated with
24 prostaglandin analogs”), 110-11 (after stating verbatim the warnings on Lash Boost packaging,
noting that the labels do “not adequately disclose and warn of adverse effects,” and explaining why),
118 (R+F “did not fully and adequately advise [its] consultants about the adverse effects”), 125-38
(alleging in detail the substance of advertising statements and statements on the R+F website, and
explaining why these statements fail to disclose Lash Boost side effects).

1 479, 493 (1985); *see also id.* at 499 (Congress wanted to reach both legitimate and illegitimate
2 enterprises).

3 What matters under *Boyle* is that Plaintiffs plausibly allege that two or more individuals had the
4 common purpose of increasing sales of Lash Boost through fraudulent means. Although the
5 independent consultants were unwitting co-conspirators, they were used by R+F in furtherance of its
6 scheme to defraud consumers by knowingly concealing Lash Boost's serious side effects. Drs. Rodan
7 and Fields—as individuals distinct from the R+F corporate entity and from the independent
8 consultants—also had the common purpose of perpetuating the fraudulent scheme by touting their
9 status as doctors to hold the company out as a source of trusted information and to distinguish their
10 company from other cosmetic companies. CC ¶¶ 119, 252.

11 Plaintiffs also plausibly allege that the enterprise featured relationships among those associated
12 with it. The enterprise was more than a mere routine contractual relationship. Instead, Plaintiffs allege
13 strong relationships both *among* the consultants and between the consultants and R+F. The strong
14 relationships among the consultants are shown by the annual conventions and Facebook groups R+F
15 hosts—which the consultants then use to network with, learn from, and support each other. *Id.* ¶¶ 389,
16 399. The relationship between R+F and its consultants is also highly structured, with compensation
17 plans for consultants, *id.* ¶ 419, and a “nurse line” to answer consultants’ product-related questions, *id.*
18 ¶ 427. R+F thus has the organizational structure sufficient to form an enterprise and the longevity
19 necessary to accomplish the enterprise’s purpose.

20 These strong and close relationships distinguish this case from those on which R+F relies. In
21 *Jubilerer v. MasterCard International*, 68 F. Supp. 2d 1049 (W.D. Wis. 1999), a gambler lost money
22 at an online casino and sued his credit card company and bank under RICO. The district court ruled
23 that the plaintiff had not alleged an enterprise because each party was simply conducting its own
24 affairs, without any hierarchical or consensual decision making. *Id.* at 1052-53. Here, by contrast,

1 R+F's consultants sell Lash Boost on behalf of, and at the directions of, R+F. *See* CC ¶¶ 387-88, 390,
2 395. In *In re Countrywide Financial Mortgage-Backed Securities Litigation*, No. 2:11-ML-02265-
3 MRP (MANx), 2012 WL 10731957 (C.D. Cal. June 29, 2012), the non-Countrywide entities were
4 "actively competing with each other," and there were no facts suggesting coordinated behavior. *Id.* at
5 *9. Here, however, R+F consultants worked directly with R+F to further its goals, and consultants
6 collaborated among themselves. *See, e.g.*, CC ¶¶ 387-89.

7 **4. Plaintiffs satisfy RICO's predicate-racketeering-acts requirement.**

8 A "pattern of racketeering activity" requires the commission of at least two predicate acts
9 within a ten-year period. *See* 18 U.S.C. § 1961(5). These predicate acts may be mail or wire fraud, *id.*
10 § 1961(1), whose elements are (1) the formation of a scheme to defraud, (2) the use of the mails or
11 wires in furtherance of that scheme, and (3) the specific intent to defraud. *Eclectic Props. E., LLC v.*
12 *Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Plaintiffs have alleged these elements.
13 They have identified a fraudulent scheme—a scheme of consciously concealing Lash Boost's side
14 effects to gain higher profits for R+F. *See* CC ¶¶ 386, 391, 394, 395. They have identified multiple
15 uses of the mails or wires in furtherance of the scheme between 2016 and 2018. These include
16 mailings of the Lash Boost product itself, which included knowingly deceptive warning labels, *id.* ¶¶
17 417-18; fraudulent misrepresentations made on R+F's website, transmitted via wire-communication
18 technology, *id.* ¶¶ 124-25, 130, 133, 137, 419; and promotional materials posted elsewhere on the
19 internet—materials that failed to disclose the product's harmful side effects, *id.* ¶ 422. And finally,
20 they have alleged ample facts from which to infer fraudulent intent. *See supra* 19.

21 a. Plaintiffs plausibly allege a scheme to defraud.

22 R+F appears to argue that Plaintiffs have failed to plead a fraudulent scheme because they have
23 not properly alleged that Lash Boost had serious side effects, that Plaintiffs relied on R+F's warnings,
24 or that Plaintiffs would have become aware of Lash Boost's side effects if R+F had properly disclosed

1 them. MTD 34-35. But Plaintiffs *have* properly alleged that Lash Boost has serious side effects and
2 that Plaintiffs would have become aware of these dangers if they had been properly disclosed. *See*
3 *supra* 9-11. And R+F does not explain why reliance is relevant to whether it had a fraudulent scheme,
4 as opposed to whether that fraudulent scheme proximately caused Plaintiffs' injuries.

5 R+F also argues that it had no duty to disclose Lash Boost's side effects. That is incorrect.
6 R+F had a duty to disclose those side effects because it made affirmative misrepresentations and
7 misleading half-truths about Lash Boost. *See United States v. Lloyd*, 807 F.3d 1128, 1153 (9th Cir.
8 2015) (citing *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010)) (duty to disclose arises
9 from affirmatively telling a misleading half-truth); *accord, e.g., Emergency v. Am. Gen. Fin., Inc.*, 71 F.3d
10 1343, 1348 (7th Cir. 1995). For example, on the packaging to which all Plaintiffs were exposed,
11 CC ¶ 109, R+F told consumers to stop using Lash Boost if they experienced irritation, without
12 disclosing that irritation was a known side effect of Lash Boost's active ingredient. This is, at best, a
13 misleading half-truth about skin irritation. *See supra* 15-16. R+F also told consumers that they should
14 not be concerned about Lash Boost's side effects because it is a cosmetic, CC ¶ 130; that some
15 consumers "may report temporary tingling or redness," when the truth is that the side effects may be
16 permanent and far more severe than tingling or redness, *id.* ¶¶ 125-26; and that Lash Boost is safe,
17 non-irritating, and would not affect the structure or function of lashes, when the truth is that Lash
18 Boost is unsafe, irritating, and does affect the structure of lashes, *id.* ¶¶ 133-35. All these half-truths
19 and affirmative misrepresentations obliged R+F to disclose the truth. When R+F consciously decided
20 not to tell the truth in its mail and wire communications, it committed fraud.

21 b. Plaintiffs plausibly allege use of the mails or wires in furtherance of the scheme.

22 Although the thrust of its argument is not entirely clear, R+F appears to suggest that two of its
23 predicate acts directed at Plaintiff Buckingham could not have been performed in furtherance of the
24 fraudulent scheme because the acts did not cause harm. *See* MTD 34:19-26. But "Plaintiffs need not

1 plead or prove that they have suffered harm as a result of each individual predicate act, but rather that
2 the predicate acts are all part of a pattern of racketeering activity and that they have suffered harm as a
3 direct result of at least one predicate act,” *Just Film, Inc. v. Merch. Servs., Inc.*, No. C 10-1993 CW,
4 2012 WL 6087210, at *14 (N.D. Cal. Dec. 6, 2012), which these Plaintiffs have done. *See supra* 28-
5 29. Moreover, to be in furtherance of a fraudulent scheme, a wire or mail “communication itself need
6 not be fraudulent, so long as it is ‘either incident to an essential part of the scheme’ or a ‘step in the
7 plot.’” *Perkumpulan Inv’r Crisis Ctr. Dressel—WBG v. Regal Fin. Bancorp. Inc.*, 781 F. Supp. 2d
8 1098, 1111 (W.D. Wash. 2011) (quoting *United States v. Rude*, 88 F.3d 1538, 1544 (9th Cir. 1996)).
9 This accurately describes R+F’s mailing and wire communication to Buckingham, because they were a
10 necessary incident to the sale of Lash Boost.

11 c. Plaintiffs plausibly allege specific intent to defraud.

12 R+F argues that Plaintiffs failed to plead a specific intent to defraud or R+F’s knowledge of the
13 falsity of its statements or omissions. MTD 35. Plaintiffs have alleged, however, that R+F knew that
14 its statements and omissions about Lash Boost were false when it made them, and that it made them
15 with an intent to induce reliance. *See supra* 17-18, 19. This satisfies the specific-intent requirement
16 under the federal mail and wire fraud statutes.

17 R+F maintains that because cosmetics sales are facially legitimate, Plaintiffs must meet a
18 heightened pleading standard. But *Eclectic Properties*, the case on which R+F relies, “did not alter the
19 requirements of Rule 9(b) that allegations of scienter may be alleged generally.” *State Compensation*
20 *Ins. Fund v. Capen*, No. SACV 15-1279 AG (CWx), 2015 WL 13322034, at *6 (C.D. Cal. Dec. 18,
21 2015). And the Complaint contains “a significant level of factual specificity.” *Eclectic Props.*, 751
22 F.3d at 998. It alleges detailed facts to show that the scheme of concealing Lash Boost’s serious side
23 effects was “reasonably calculated to deceive persons of ordinary prudence and comprehension.” *Id.* at
24 997 (quotation and citation omitted); *see also supra* 15-17 (citing CC ¶¶ 119, 133 140-41, 364, 375,

1 386). It also alleges detailed facts (1) about the volume and unanimity of the scientific literature on the
2 side effects of prostaglandin analogs, including an FDA warning letter about the very same ingredient
3 in Lash Boost, CC ¶¶ 88-91; (2) about R+F's explicit acknowledgment that other lash products, which
4 contain prostaglandin analogs, cause side effects, *id.* ¶ 130; (3) about R+F's expertise and resources,
5 which would have alerted them to this literature, *see id.* ¶¶ 119, 133; and (4) about consumers'
6 complaints that Lash Boost had side effects, *id.* ¶¶ 140-41. Together, these allegations create a
7 reasonable inference that when R+F failed to disclose Lash Boost's side effects, it did so with
8 fraudulent intent.

9 **VI. IN THE ALTERNATIVE, LEAVE TO AMEND SHOULD BE GRANTED**

10 For the reasons given above, Plaintiffs have stated valid claims. Should the Court conclude
11 that Plaintiffs have not alleged facts sufficient to establish any of their claims, however, Plaintiffs
12 respectfully seek leave to amend. Under Rule 15(a), leave to amend "shall be freely given when
13 justice so requires," and since this case is still at the pleadings stage, this request is timely, and R+F
14 will not suffer prejudice, leave to amend should be granted. *See DCD Programs, Ltd. v. Leighton*, 833
15 F.2d 183, 185 (9th Cir. 1987).

16 **VII. CONCLUSION**

17 R+F's motion to dismiss should be denied.

18 DATED this 19th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to parties and attorneys who are filing users.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 19, 2018

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